

Deborah A. Sivas (Calif. Bar No. 135446)
Leah J. Russin (Calif. Bar No. 225336)
Carolyn Bills (Certified Law Student)
Edmund J. Gorman, Jr. (Certified Law Student)
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305
Telephone: (650) 725-8571
Facsimile: (650) 723-4426
dsivas@stanford.edu
leahrussin@law.stanford.edu

Andrea A. Treece (Calif. Bar No. 237639)
CENTER FOR BIOLOGICAL DIVERSITY
1095 Market Street Suite 511
San Francisco, California
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
atreece@biologicaldiversity.org

Attorneys for Plaintiff Center for Biological Diversity

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, a)
non-profit corporation,)
Plaintiff,)
v.)
MICHAEL CHERTOFF, in his official capacity)
as Secretary of the U.S. Department of Homeland)
Security, REAR ADMIRAL PAUL F.)
ZUKUNFT, in his official capacity as)
Commander of U.S. Coast Guard District Eleven,)
and UNITED STATES COAST GUARD,)
Defendants.)
Case No. 08-CV-02999 MMC
PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT AND
MEMORANDUM OF
POINTS AND
AUTHORITIES IN
SUPPORT THEREOF
Date: October 3, 2008
Time: 9:00 a.m.
Judge: Hon. Maxine Chesney
Courtroom: Ctrm. 7, 19th Flr

**PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT AND
MEMORANDUM OF
POINTS AND
AUTHORITIES IN
SUPPORT THEREOF**

Date: October 3, 2008

Time: 9:00 a.m.

Judge: Hon. Maxine Chesney
Courtroom: Ctrm. 7, 19th Flr.

NOTICE OF MOTION

PLEASE TAKE NOTICE that at 9:00 a.m. on October 3, 2008, or as soon thereafter as the matter may be heard in the Honorable Judge Maxine M. Chesney's courtroom of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Plaintiff, Center for Biological Diversity, will move this Court pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rules 7-2, 7-4, and 56 for summary judgment on its Claim for Relief in its Complaint. This motion is based on the accompanying Memorandum of Points and Authorities, the Declarations of Andrea Treece, Brendan Cummings and Douglas Bevington, the pleadings, records and files in this action, and other such documentary and oral evidence that may be supplied at the hearing.

For the reasons set forth in the accompanying Memorandum of Points and Authorities, the continuing failure of Defendants, Michael Chertoff, Secretary of the U.S. Department of Homeland Security, Rear Admiral Paul F. Zukunft¹, Commander of U.S. Coast Guard District Eleven, and the United States Coast Guard, to consult with the National Marine Fisheries Service regarding the impacts of Defendants' regulation of ship traffic off the coast of California on threatened and endangered whales and other species violates the requirements of section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). Plaintiffs seek declaratory and injunctive relief to remedy this violation, including an order requiring Defendants to complete ESA section 7 consultation.

¹ Rear Admiral Paul F. Zukunft took command of District 11 from Rear Admiral Craig E. Bone on August 7, 2008.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**

2 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

3

4 **TABLE OF CONTENTS**

5 I.	INTRODUCTION.....	1
6 II.	STANDARD OF REVIEW	2
7 III.	LEGAL FRAMEWORK.....	2
8 A.	The Endangered Species Act.....	2
9 B.	The Ports and Waterways Safety Act.....	4
10 IV.	FACTUAL BACKGROUND	5
11 A.	Increasing Numbers of Blue Whales Are Being Killed in Santa Barbara Channel.....	6
12 B.	Ship Traffic Affects Endangered Species Along the California Coast.....	7
13 C.	The Coast Guard Has Not Consulted Regarding its Control of Ship Traffic.....	8
14 V.	ARGUMENT	11
15 A.	The Coast Guard's Actions Regarding Ship Traffic Are Agency Actions That Trigger Consultation	11
16 1.	The Coast Guard Has Exercised the Authority Vested in It by the PWSA to Regulate Ship Traffic Off the California Coast.....	12
17 2.	The Coast Guard's Regulation of Ship Traffic Constitutes Agency Action That Has Ongoing Impacts.....	13
18 B.	The Coast Guard Has Statutory Authority to Benefit Endangered Species.....	14
19 C.	The Coast Guard's Actions May – and Do -- Affect Endangered Species.....	15
20 D.	New Information About Whale Mortalities Requires Consultation	16
21 VI.	CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986).....	2
<u>California Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n</u> , 472 F.3d 593 (9th Cir. 2006)	12
<u>City of Sausalito v. O'Neill</u> , 386 F.3d 1186 (9th Cir. 2004)	15
<u>Defenders of Wildlife v. Gutierrez</u> , 2008 U.S. App. LEXIS 15294 (D.C. Cir. July 18, 2008).....	12, 13
<u>Env'l. Prot. Info. Ctr. v. Simpson Timber Co.</u> , 255 F.3d 1073 (9th Cir. 2001).....	14
<u>Mt. Graham Red Squirrel v. Madigan</u> , 954 F.2d 1441 (9th Cir. 1992)	16
<u>Nat'l Ass'n of Home Builders v. Defenders of Wildlife</u> 127 S. Ct. 2518 (2007).....	3
<u>Natural Resources Defense Council v. Houston</u> , 146 F.3d 1118 (9th Cir. 1998).....	3, 15
<u>Pac. Coast Fedn. of Fishermen's Ass'ns v. U.S. Bureau of Reclamation</u> , 2006 U.S. Dist. LEXIS 24893 (N.D. Cal. March 27, 2006).....	16
<u>Pacific Rivers Council v. Thomas</u> , 30 F.3d 1050 (9th Cir. 1994)	3, 13
<u>Sierra Club v. Babbitt</u> , 65 F.3d 1502 (9th Cir. 1995)	14
<u>Sierra Club v. Marsh</u> , 816 F.2d 1376 (9th Cir. 1987)	16
<u>Tennessee Valley Authority v. Hill</u> , 437 U.S. 153 (1978).....	2
<u>Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.</u> , 340 F.3d 969 (9th Cir. 2003)	3, 14
<u>Washington Toxics Coalition v. Env'l. Prot. Agency</u> , 413 F.3d 1024 (9th Cir. 2005).....	14
<u>Statutes</u>	
16 U.S.C. § 1531(b)	2
16 U.S.C. § 1536(a)	3, 4
16 U.S.C. § 1536(b)	4
16 U.S.C. § 1536(c).....	15
16 U.S.C. § 1540(f).....	15

1	16 U.S.C. § 470f	13
2	33 C.F.R. § 161.1(b)	5
3	33 C.F.R. § 167.15(a).....	5
4	33 C.F.R. § 167.5(b)	5
5	33 U.S.C. §§ 1221(a)-(b)	4, 15
6	33 U.S.C. § 1222(1)	4
7	33 U.S.C. § 1223(a)	4, 5, 12
8	33 U.S.C. § 1223(c)	5, 10, 12
9	33 U.S.C. § 1224(a)	5, 15
10	33 U.S.C. §§ 1231(a)-(b)	5
11	42 U.S.C. § 4321 <i>et seq.</i>	13

Regulations

14	33 C.F.R. § 1.05-1.....	12
15	50 C.F.R. § 402.01	3
16	50 C.F.R. §§ 402.02-402.03.....	3
17	50 C.F.R. § 402.14.....	3, 4, 15
18	50 C.F.R. § 402.16.....	3, 16

Rules

21	Fed. R. Civ. P. 56(c)	2
22	Fed. R. Civ. P. 56(e)	2

Other Authorities

25	35 Fed. Reg. 18,319 (Dec. 12, 1970).....	6, 8
26	64 Fed. Reg. 32,451 (June 17, 1999)	9
27	65 Fed. Reg. 31856 (May 19, 2000).....	9, 13
28	65 Fed. Reg. 46603 (July 31, 2000).....	10, 13
	65 Fed. Reg. 53911 (Sept. 6, 2000)	9, 13

1	65 Fed. Reg. 62292 (Oct. 18, 2000).....	10, 13
2	65 Fed. Reg. 67249 (Nov. 9, 2000).....	13
3	67 Fed. Reg. 49578 (July 31, 2002).....	13
4	E.O. 13175.....	13
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 All too often, endangered whales are killed by collisions with ship traffic off the
3 California coast without any analysis of how these deaths may affect the species as a whole.
4 The area's ecological richness and its proximity to major ports make it a magnet for whales and
5 ship traffic alike. Whales rely on these waters to provide critical food sources and migratory
6 corridors. For instance, blue whales, the largest mammals on earth and among the most
7 imperiled, congregate off the coast in the summer and fall to feed on concentrated swarms of
8 krill. Humpback, sei, sperm, and the nearly extinct North Pacific right whale also inhabit these
9 waters. In increasing numbers, ships use the same area en route to and from major West Coast
10 ports. Unfortunately, the combination has proven deadly for too many whales. Whales near the
11 surface are vulnerable to massive, fast-moving commercial ships that may not even be aware of
12 their presence. Unable to escape the path of those giant vessels, whales are struck, injured, and
13 killed as they surface for breath, feed, travel and rest near the surface.

14 As the federal agency that regulates and directs the considerable vessel traffic off the
15 California coast, the United States Coast Guard ("Coast Guard") must insure, through
16 consultation with the National Marine Fisheries Service ("NMFS"), that its actions will not
17 jeopardize blue whales and other protected species as required by the Endangered Species Act
18 ("ESA"). Yet the Coast Guard has never consulted with NMFS regarding its control of shipping
19 traffic and the effects on whales and other listed species in the waters off of California.

20 The unprecedented number of endangered blue whales killed by ship strikes in the Santa
21 Barbara Channel in 2007 presents a vivid example of the harm wrought by the Coast Guard's
22 failure to comply with its duties under the ESA. Ship traffic in the Santa Barbara Channel,
23 which leads to the Los Angeles and Long Beach ports, is among the busiest in the world, and
24 poses a known threat to the survival and recovery of a number of endangered whale species. In
25 2007 alone, ship collisions are known to have killed at least three blue whales in the Santa
26 Barbara Channel; it is likely that even more unreported or undetected deaths and injuries
27 occurred. These whales belonged to a population so imperiled that the death of just one of them
28 could be sufficient to prevent the population's recovery. If ships continue to kill blue whales at

1 the rate observed in 2007, the species' survival and recovery will become increasingly unlikely.

2 Despite this threat, the Coast Guard has failed to fulfill its non-discretionary duty under
 3 the ESA to ensure that ship traffic does not jeopardize the blue whale or any other endangered
 4 whale species. Until the Coast Guard completes consultation with NMFS and undertakes
 5 actions necessary to avoid jeopardy to these species, ships will continue to strike and kill
 6 endangered whales in the shipping lanes off the coast of California.

7 Plaintiff Center for Biological Diversity seeks an order compelling the Coast Guard to
 8 initiate and complete consultation with NMFS regarding the effects of its regulation of ship
 9 traffic on blue whales and other endangered and threatened species in the waters off the
 10 California coast. Such relief is necessary to prevent illegal agency action and forestall
 11 irreparable injury to protected species.

12 **II. STANDARD OF REVIEW**

13 Summary judgment should be granted where there is no genuine issue as to any material
 14 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
 15 Where the moving party has demonstrated that there is no material issue of fact for trial, the
 16 "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading,
 17 but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ.
 18 P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

19 **III. LEGAL FRAMEWORK**

20 **A. The Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.***

21 Congress enacted the ESA to provide "a means whereby the ecosystems upon which
 22 endangered species and threatened species depend may be conserved . . . [and] a program for the
 23 conservation of such endangered species and threatened species . . ." 16 U.S.C. § 1531(b). The
 24 Supreme Court has explained that "the plain intent of Congress . . . was to halt and reverse the
 25 trend toward species extinction, whatever the cost." Tennessee Valley Authority v. Hill, 437
 26 U.S. 153, 184 (1978).

27 The National Marine Fisheries Service has primary responsibility for implementing the
 28 goals and ideals of ESA with regards to most marine species, including whales and other marine

1 mammals and sea turtles. 50 C.F.R. § 402.01(b).² Each federal agency must consult with
 2 NMFS whenever their actions “may affect” listed marine species to “insure that any action
 3 authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued
 4 existence of any endangered species or threatened species. . . .” 16 U.S.C. § 1536(a)(2) (section
 5 7 consultation requirement); see also 50 C.F.R. § 402.14.

6 This consultation requirement applies to all discretionary “activities or programs of any
 7 kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United
 8 States or upon the high seas,” including granting rights-of-way. 50 C.F.R. §§ 402.02-402.03;
 9 See Nat'l Ass'n of Home Builders v. Defenders of Wildlife 127 S. Ct. 2518, 2536 (2007)
 10 (holding that section 7(a)(2) consultation is required for all discretionary agency actions).
 11 Agency action “has been defined broadly” for purposes of triggering section 7 consultation.
 12 Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998). ESA
 13 consultation is required whenever the action agency has discretion that can “inure to the benefit
 14 of protected species.” Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340
 15 F.3d 969, 974, 977 (9th Cir. 2003). Agencies must consult regarding the impacts not only for
 16 one-time actions, but also for actions that are continuing in nature or effect, such as the
 17 promulgation of plans that will guide future actions. Pacific Rivers Council v. Thomas, 30 F.3d
 18 1050, 1053 (9th Cir. 1994) (actions with “an ongoing and long-lasting effect even after
 19 adoption” represent ongoing agency action and trigger consultation requirements of section 7.).
 20 Furthermore, if new information regarding the species or the impact arises after completion of
 21 consultation on an action with continuing impacts, the action agency must reinitiate formal
 22 consultation with NMFS or FWS, as appropriate. 50 C.F.R. § 402.16.

23 Consultation is intended to protect listed species by allowing NMFS’s biological experts
 24 to evaluate the risk of any proposed action by another agency (in this case the Coast Guard), and
 25

26 ² The ESA vests primary responsibility for administering and enforcing the statute with the
 27 Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have
 28 delegated this responsibility to NMFS (within the National Oceanic and Atmospheric
 Administration) and the U.S. Fish and Wildlife Service (“FWS”) respectively. 50 C.F.R. §
 402.01(b).

1 impose appropriate mitigation where necessary, or prohibit the action altogether if the risk to the
 2 survival and recovery of the species is too great. As part of formal consultation, NMFS issues a
 3 biological opinion articulating its consideration, analysis, and ultimate determination regarding
 4 whether the agency action is likely to jeopardize the continued existence of the species or
 5 destroy or adversely modify its critical habitat. 16 U.S.C. §§ 1536(a)(2) and (b)(3)(A); 50
 6 C.F.R. § 402.14. When NMFS determines that an action will result in the “take” (harm or
 7 killing) of any endangered or threatened species as defined by the ESA, it may grant the action
 8 agency an incidental take statement authorizing such take —if it imposes mitigation
 9 requirements that would prevent the agency action from reducing the likelihood of the species’
 10 survival and recovery. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14.

11 B. The Ports and Waterways Safety Act, 33 U.S.C. § 1221 *et seq.*

12 The Ports and Waterways Safety Act (“PWSA”) empowers the Coast Guard to regulate
 13 navigation within the jurisdiction of the United States, including in the waters off the California
 14 Coast. Congress further specified that the Coast Guard is responsible for the protection of the
 15 marine environment in the exercise of its authority under the PWSA. 33 U.S.C. §§ 1221(a)-(b)
 16 (“navigation and vessel safety, [and] protection of the marine environment . . . are matters of
 17 major national importance;” “increased vessel traffic in the Nation’s ports and waterways
 18 creates substantial hazards to life, property, and the marine environment.”). The PWSA defines
 19 the marine environment to include all “navigable waters of the United States and . . . resources
 20 therein and thereunder” and “waters and fishery resources of any area over which the United
 21 States asserts . . . authority.” 33 U.S.C. § 1222(1).

22 Under the authority of the PWSA, the Coast Guard has continuing discretion to regulate
 23 marine vessels through several broad and overlapping statutory directives. First, the Coast
 24 Guard is authorized to operate and maintain “vessel traffic services,” which include a variety of
 25 measures for controlling vessel traffic to protect “navigation and the marine environment,”
 26 including reporting and operating requirements, surveillance and communication systems,
 27 routing systems, and fairways. 33 U.S.C. § 1223(a)(1). Once established, a vessel traffic
 28 service controls the movement of vessels in order to minimize the risk of “damage to property or

1 the environment.” 33 C.F.R. § 161.1(b). Second, the PWSA provides that the Coast Guard
 2 “shall designate necessary fairways and traffic separation schemes [(“TSS”)³] for vessels
 3 operating in the territorial sea of the United States. . . .” 33 U.S.C. § 1223(c)(1). Third, the
 4 Coast Guard is authorized to control vessel traffic in hazardous areas by establishing routing
 5 limits, speed limits, and other operating limitations. 33 U.S.C. § 1223(a)(4). Fourth, after TSSs
 6 and other measures have been established, the PWSA authorizes the Coast Guard to
 7 continuously adjust the location or limits of a TSS, in part to accommodate other uses. 33
 8 U.S.C. § 1223(c)(5)(C); 33 C.F.R. § 167.15(a). Finally, the statute requires the Coast Guard to
 9 promulgate implementing regulations and grants continuing authority to amend or repeal those
 10 regulations. 33 U.S.C. §§ 1231(a)-(b).

11 The PWSA requires that the Coast Guard, in its exercise of discretion, “take into account
 12 all relevant factors concerning navigation and vessel safety, [and] protection of the marine
 13 environment,” including “any other potential or actual conflicting activity” and “environmental
 14 factors.” 33 U.S.C. § 1224(a). Thus, Congress granted the Coast Guard discretion to control,
 15 through regulation and rules, the movement of ships off the California Coast, continuing
 16 discretion to adjust and suspend those regulations and rules as needed, and finally, the mandate
 17 to protect wildlife, including endangered marine mammals.

18 **IV. FACTUAL BACKGROUND**

19 The waters off the California coast provide a busy byway for whales and ships alike.
 20 Since 2000, more than a dozen whales have been struck and injured or killed by ships traveling
 21 along the California coast. Declaration of Andrea A. Treece (“Treece Decl.”), Ex. A (NMFS,
 22 Large Whale Ship Strike Database (January 2004)); see also Declaration of Brendan Cummings
 23 (“Cummings Decl.”), Ex. D (NMFS, Resp. to Petition from CBD to Implement Emergency
 24 Regs. in So. Cal. to Protect Blue Whales (Jan. 8, 2008)) at 2. The alarming number of blue
 25 whales killed in the Santa Barbara Channel in 2007 alone amply demonstrates the significant
 26

27 ³ A Traffic Separation Scheme is a “designated routing measure which is aimed at the separation
 28 of opposing streams of traffic by appropriate means and by the establishment of traffic lanes.”
 33 C.F.R. § 167.5(b).

1 effect that ship traffic has on this and other endangered species.

2 **A. Increasing Numbers of Blue Whales Are Being Killed in the Santa Barbara
3 Channel.**

4 Every year, thousands of large vessels travel up and down the California Coast, and
5 through the Santa Barbara Channel, using the traffic separation scheme implemented by the
6 Coast Guard. The Santa Barbara Channel is also within essential habitat for a number of
7 endangered and threatened whales; it is a prime feeding ground and part of their migratory
8 route. The overlap of these shipping lanes with the foraging habitat and migratory routes of
9 whales puts these endangered species at great risk. See Cummings Decl., Ex. D at 2. The
10 convergence of ships and whales has resulted in injury and mortality.

11 The blue whale (*Balaenoptera musculus*) has been listed as endangered under the ESA
12 since 1970. 35 Fed. Reg. 18,319 (Dec. 12, 1970); Fed. Def. Answer to Complaint (“Answer”)
13 ¶26. It is the largest animal known to have ever lived on earth. Once numbering over 300,000,
14 the global blue whale population has been reduced by commercial whaling to likely fewer than
15 10,000 individuals. Blue whales off California are part of the Eastern North Pacific Stock, and
16 the current best population estimate for the Eastern North Pacific Stock is 1,186 animals.
17 Treece Decl., Ex. B (NMFS, Stock Assessment for the Blue Whale Eastern North Pacific Stock
18 (Oct. 30, 2007)) at 177.

19 Blue whales usually pass through the Santa Barbara Channel during their migration.
20 Historically, ships have regularly, if relatively infrequently, hit and injured or killed these
21 whales off the California coast. According to the most recent stock assessment report, “ship
22 strikes were implicated in the deaths of blue whales in 1980, 1986, 1987, 1993, 2002, and
23 2004.” Id. at 179. Importantly, the total number of whales killed and injured by ships may far
24 exceed the reported numbers for any given year: NMFS reports that “[g]iven the fact that large
25 vessel operators often do not detect the impact of striking a whale, animals may be hit and
26 passed over without observation. Likewise, operators may be aware of a strike, but choose not
27 to report it. . . . [I]t is highly likely that far more collisions are occurring than are actually
28 reported.” Treece Decl., Ex. C (NMFS, “Large Whale Strikes Relative to Vessel Speed”) at 3.

1 NMFS has determined that the Eastern North Pacific Stock of blue whales can withstand no
 2 more than one non-natural death per year in U.S. waters while still reaching its optimum
 3 sustainable population. Treece Decl., Ex. B at 177.

4 Last year, large numbers of blue whales remained in the Santa Barbara Channel longer
 5 than usual, keeping them in the middle of some of the busiest shipping lanes in the world well
 6 into the fall. Perhaps as a result of the whales' extended stay in the channel (where the shipping
 7 traffic is controlled by the Coast Guard), at least three blue whales were killed by ships in the
 8 fall of 2007 alone. Cummings Decl., Ex. D at 2. Between September 8 and September 19,
 9 2007, federal agencies received reports of five sightings of dead blue whales in the area
 10 extending from Santa Cruz Island to immediately north of San Diego. Another dead adult
 11 female, accompanied by a very young animal, also dead, washed ashore on San Miguel Island
 12 on November 29, 2007. Necropsies of these dead whales revealed that they were likely killed as
 13 a result of collisions with ships. Id.

14 NMFS has issued a recovery plan for the blue whale which identified ship collisions as a
 15 significant threat to the species in the Pacific. Treece Decl., Ex. D (NMFS, Recovery Plan for
 16 the Blue Whale (July 1998)) at 15, 24. The recovery plan recommends specific steps to aid in
 17 the recovery of the blue whale, including: "Identify areas where ship collisions with blue whales
 18 might occur, and areas where concentrations of blue whales coincide with significant levels of
 19 maritime traffic or pollution," and "Identify and implement methods to reduce ship collisions
 20 with blue whales." Id. at 24. The recovery plan concludes that "[i]mplementation of
 21 appropriate measures designed to reduce or eliminate such problems are essential to recovery."
 22 Id. Because the Coast Guard has failed to consult with NMFS, NMFS has not had the
 23 opportunity to implement these measures in a take statement or biological opinion. As a result,
 24 blue whales and other endangered whales face a continuous threat from ship traffic regulated by
 25 the Coast Guard.

26 **B. Ship Traffic Affects Endangered Species Along the California Coast.**

27 While the death of blue whales in the Santa Barbara Channel provides a recent and stark
 28 illustration of the threat posed by ship traffic, blue whales are not at risk only in that area, nor

1 are they the only species affected by ship traffic off California. The Coast Guard's regulation of
 2 ship traffic affects blue whales and a number of other protected whales (and even sea turtles) in
 3 the waters along the entire California Coast. The humpback whale migrates and lives in the
 4 waters off the California Coast and is impacted by the Coast Guard's actions. The humpback
 5 whale (*Megaptera novaeangliae*), like the blue whale, has been listed as "endangered" under the
 6 ESA since 1970. 35 Fed. Reg. 18,319 (Dec. 12, 1970); Answer at ¶30. The Eastern North
 7 Pacific stock of humpback whales, which travel through the Santa Barbara Channel en route to
 8 and from their calving grounds further south, has been reduced to just over 1,300 individuals.
 9 Treece Decl., Ex. E (NMFS, Stock Assessment Report for Eastern North Pacific Stock of
 10 Humpback Whales (Nov. 1, 2005)) at 167. NMFS has determined that the number of non-
 11 natural deaths that the stock can incur while still reaching or maintaining its optimal sustainable
 12 population is 2.3 animals per year in U.S. waters. Although less than that number are usually
 13 reported dead from ship collisions, more humpback whales are likely killed or injured by ship
 14 strikes than are reported. Id. at 168. Humpbacks tend to stay in coastal waters and avoid the
 15 open sea, particularly mothers returning from the breeding grounds with their young. This
 16 characteristic makes them especially vulnerable. Indeed, it is the second most common species
 17 of whale to be killed as a result of collisions with ships.

18 Other protected species also occur off the California Coast, Answer at ¶36, and are
 19 impacted by the shipping traffic here. These species, including the sei whale (*Balaenoptera*
 20 *borealis*), the sperm whale (*Physeter macrocephalus*), and the North Pacific right whale
 21 (*Eubalaena japonica*), are similarly threatened by shipping traffic. In recent years, numerous
 22 unidentified whales have been killed in the waters off the coast of California. Cummings Decl.,
 23 Ex. A. The Coast Guard's implementation of the Santa Barbara Channel TSS and other
 24 shipping regulations off the California Coast put these species at greater risk of collisions with
 25 ships.

26 **C. The Coast Guard Has Not Consulted Regarding its Control of Ship Traffic.**

27 The Coast Guard, particularly District 11, has exercised its authority under the PWSA to
 28 regulate the considerable ship traffic off the California coast for many years. California ports

1 welcome cargo ships laden with imports from around the globe and send other cargo ships out
 2 with exported domestic goods. Oil tankers travel up and down the coastline using Coast Guard-
 3 regulated shipping lanes. These massive vessels travel to the ports of San Francisco, Oakland,
 4 and Richmond in San Francisco Bay, as well as San Diego, Los Angeles, and Long Beach in
 5 southern California. Answer at ¶24. The Ports of Los Angeles and Long Beach are the most
 6 active of any U.S. ports, with thousands of large vessels arriving each year. Answer at ¶23;
 7 Treece Decl., Ex. F (American Association of Port Authorities, 2005 World Port Rankings).
 8 The Santa Barbara Channel is among the busiest shipping lanes in the world. *Id.*

9 Though the Coast Guard controls and regulates shipping off the California coast, it has
 10 never formally consulted with NMFS regarding the impacts of ship traffic to protected species.
 11 Three traffic separation schemes (“TSSs”) off the California coast have been adopted by the
 12 International Maritime Organization (“IMO”). The IMO adopted TSSs off San Francisco and in
 13 the Santa Barbara Ship Channel in 1968 and 1969, respectively. A third TSS abutting the Santa
 14 Barbara Channel in the approaches to Los Angeles-Long Beach was adopted in 1975. 64 Fed.
 15 Reg. 32,451, 32,452 (June 17, 1999) (discussing the history of the Santa Barbara Ship Channel
 16 TSS). Since that time, the Coast Guard has repeatedly adjusted these TSSs and other vessel
 17 traffic control measures in accordance with its authority under the PWSA. See, e.g., id. at
 18 32452-53 (discussing history of California coast port access route studies and TSS adjustments
 19 through 1999); see also Answer at ¶38-40 (implementation of TSSs and changes to them). In
 20 2000, the Coast Guard published the results of a port access route study (“PARS”) for the
 21 approaches to Los Angeles-Long Beach, resulting in a number of recommended changes to
 22 existing vessel routing and traffic management measures. 65 Fed. Reg. 31856, 31857 (May 19,
 23 2000) (PARS results); 65 Fed. Reg. 53911 (Sept. 6, 2000) (final rule implementing changes to
 24 TSS in approaches to LA-Long Beach); 65 Fed. Reg. 62292 (Oct. 18, 2000) (final rule making
 25 changes to San Pedro Regulated Navigation Area). In the same year, the Coast Guard also
 26 promulgated amendments to the TSSs off San Francisco and in the Santa Barbara Channel to
 27 route commercial vessels farther offshore and thus farther from the Monterey Bay National
 28 Marine Sanctuary. 65 Fed. Reg. 46603 (July 31, 2000).

1 The Coast Guard has continued to implement the Santa Barbara Channel TSS and others
 2 off the California Coast. Answer at ¶40. The Coast Guard continually reviews the TSSs,
 3 advises vessel traffic of its location and constraints, monitors and coordinates vessel traffic, and
 4 carries out enforcement activities with respect to vessel traffic. Id.; see also 33 U.S.C.
 5 §1223(c)(5)(C) (authorizing Coast Guard to “adjust the location or limits of designated fairways
 6 or traffic separation schemes, in order to accommodate the needs of other uses which cannot be
 7 reasonably accommodated otherwise”); Treece Decl., Ex. G (U.S. Coast Guard, Sector San
 8 Francisco Vessel Traffic Service User’s Manual (March 2005)) (overview of vessel traffic
 9 service and Coast Guard traffic management off San Francisco).

10 The Coast Guard also promulgates a weekly “Local Notice to Mariners” advising
 11 shipping traffic of hazards and redirecting shipping traffic as needed. Treece Decl., Ex. H (U.S.
 12 Coast Guard Dist. 11 Local Notice to Mariners for the 44th week of 2007 (Oct. 31, 2007))
 13 (issuing directive to vessel traffic to “exercise caution and operate at a safe speed when traveling
 14 through the channel and in and out of Los Angeles and Long Beach Harbors” due to presence of
 15 whales;⁴ and to separately to avoid area of capsized barge) and Ex. I (U.S. Coast Guard Dist. 11
 16 Local Notice to Mariners for the 32nd week of 2008 (Aug. 6, 2008)) (advising vessel operators
 17 of possible presence of blue whales in Santa Barbara Channel and advising them to “exercise
 18 caution.”). Notably, the Coast Guard has not formally consulted with NMFS to determine
 19 whether it should adjust the location or limits of the TSS to accommodate endangered species,
 20 despite its knowledge of their presence and vulnerability.

21 In addition to its failure to consult regarding the location and regulation of the shipping
 22 lanes, the Coast Guard has also failed to consult regarding vessel speed in the channel. The lack
 23

24 ⁴ When the presence of whales became known in 2007, the Coast Guard and other agencies
 25 issued broadcast notices to mariners asking them to voluntarily slow down. Cummings Decl.,
 26 Ex. B. Compliance with the Coast Guard’s request is unknown, as is its effectiveness. While
 27 the advisory recognized the potential harm to whales from vessel traveling at high speed, it fell
 28 far short of ESA section 7’s requirement to seek NMFS’s opinion on whether the Coast Guard’s
 regulation of ship traffic jeopardized these and other species, and what measures might be
 necessary to avoid such jeopardy.

1 of speed limits or other effective traffic control measures within the Santa Barbara Channel TSS
 2 increases the risk to whales from ships:

3 [S]hips operating at reduced speed may be less likely to impose strong
 4 hydrodynamic forces on whales which otherwise might pull whales into the path
 5 of a ship. Additionally, slower vessel speeds may give a whale more time to
 6 detect, react and avoid a vessel. Finally, collision at a slower speed results in less
 7 actual impact (physical force) to the whale and to the vessel. This may spell the
 8 difference between mortality and less serious injury for the animal. . . . Therefore,
 NOAA Fisheries recommends that speed restrictions in the range of 10-13 knots
 be used, where appropriate, feasible, and effective, in areas where reduced speed
 is likely to reduce the risk of ship strikes and facilitate whale avoidance.

9 Treece Decl., Ex. C. Finally, although the Coast Guard adjusts its control of ship traffic
 10 constantly, it does so without the guidance that would be provided by consultation with NMFS.

11 V. ARGUMENT

12 The Coast Guard's failure to engage in ESA section 7 consultation regarding the effects
 13 of its regulation of ship traffic along the California coast contravenes the statute's plain and
 14 unremitting requirements. The Coast Guard's promulgation and continued implementation of
 15 TSSs off California are indisputably agency actions that may – and do – affect a number of
 16 endangered whales and other listed species. The Coast Guard is well aware that alarming
 17 numbers of endangered whales have been injured and killed by collisions with ships, and has the
 18 discretion under the PWSA to alter its regulation of ship traffic in order to protect these species
 19 from further harm. Despite these facts, the Coast Guard has never engaged in section 7
 20 consultation. Its refusal to do so further imperils blue whales, humpbacks, and other species that
 21 the ESA was enacted to protect.

22 A. The Coast Guard's Actions Regarding Ship Traffic Are Agency Actions That 23 Trigger Consultation.

24 The Coast Guard's regulation of ship traffic in the Santa Barbara Channel and off the
 25 California Coast falls squarely within the ESA's definition of agency action triggering
 26 consultation. The Coast Guard fulfills its duties to control vessel traffic, including its location,
 27 speed, and avoidance of hazards, through its affirmative exercise of continuing discretionary
 28 authority under the PWSA. With this exercise of discretionary authority comes the non-

1 discretionary duty to ensure through section 7 consultation that the Coast Guard's actions do not
 2 jeopardize species protected under the ESA.

3 **1. The Coast Guard Has Exercised the Authority Vested in It by the
 4 PWSA to Regulate Ship Traffic Off the California Coast.**

5 As explained above, the PWSA vests authority in the Coast Guard to regulate ship traffic
 6 within U.S. waters, including the promulgation, review, and alteration of traffic separation
 7 schemes, establishment of speed limits, and other measures to control vessel traffic. 33 U.S.C.
 8 §§ 1223(a) and (c). While the International Maritime Organization plays an advisory role in
 9 regulating U.S. ship traffic, “the Coast Guard is the sole body charged with the duty of
 10 promulgating traffic separation schemes.” Defenders of Wildlife v. Gutierrez, 2008 U.S. App.
 11 LEXIS 15294, *37 (D.C. Cir. July 18, 2008), citing 33 U.S.C. §1223(c)(1) and 33 C.F.R. § 1.05-
 12 1.

13 The Coast Guard’s regulation of ship traffic is a collection of affirmative actions
 14 exercising its discretionary authority. See California Sportfishing Prot. Alliance v. Fed. Energy
15 Regulatory Comm’n, 472 F.3d 593, 595 (9th Cir. 2006) (ESA section 7 consultation
 16 requirement is triggered by affirmative actions). The Coast Guard affirmatively issues
 17 regulations directing ships where to go, what to avoid, and in some circumstances, imposes
 18 speed limits and other limitations on traffic. The Coast Guard has exercised its authority to
 19 regulate ship traffic in numerous ways. As summarized above, the Coast Guard amended the
 20 TSS in the approach to Los Angeles-Long Beach, an action that implemented changes the Coast
 21 Guard had recommended after conducting a port access route study for the area. 65 Fed. Reg.
 22 31856, 31857 (May 19, 2000) (publication of PARS results); 65 Fed. Reg. 53911 (Sept. 6, 2000)
 23 (final rule implementing changes to TSS in approaches to Los Angeles-Long Beach); 65 Fed.
 24 Reg. 62292 (Oct. 18, 2000) (final rule making changes to San Pedro Regulated Navigation
 25 Area). Similarly, the agency exercised its authority by amending the TSSs in the Santa Barbara
 26 Ship Channel and off San Francisco to protect sanctuary resources. 65 Fed. Reg. 46603 (July
 27 31, 2000). These are precisely the type of affirmative agency actions recognized by courts to
 28 require consultation. In fact, the D.C. Circuit Court of Appeals recently found that conducting

1 port access route studies and publishing the results, accepting comments on proposed TSS
 2 routes, and the publication of TSSs were “final agency actions” triggering the ESA section 7
 3 consultation requirement.⁵ Defenders of Wildlife v. Gutierrez, U.S. App. LEXIS 15294 at *41-
 4 43.

5 Since promulgating the TSS amendments, the Coast Guard has taken affirmative actions
 6 to implement the TSSs by advising oceangoing vessels on the location of the TSSs through
 7 vessel traffic services and notices to mariners (see, e.g., Trece Decl., Ex. G); continually
 8 monitoring the TSSs for hazardous conditions, including environmental hazards (see, e.g., 67
 9 Fed. Reg. 49578 (July 31, 2002) (temporary rule establishing safety zone in the Gulf of the
 10 Farallones offshore of San Francisco)); and issuing alerts to mariners using vessel traffic
 11 services (Cummings Decl., Exs. I and J). As explained below, these continuing actions to
 12 implement TSSs and other vessel traffic measures pursuant to the PWSA trigger ESA section 7
 13 consultation.

14 **2. The Coast Guard’s Regulation of Ship Traffic Constitutes Agency
 15 Action That Has Ongoing Impacts.**

16 The Coast Guard’s regulation of shipping traffic has “ongoing and long-lasting effect
 17 even after adoption,” and is continuous in nature. Therefore, the Coast Guard must engage in
 18 section 7 consultation even now. Like the forest management plans involved in Pacific Rivers
 19 Council v. Thomas, the Coast Guard’s promulgation of TSSs and other ship traffic management

20

21 ⁵ The issue whether the promulgation and implementation of vessel traffic control measures are
 22 agency actions has implications for a number of important environmental and cultural
 23 protections even outside the ESA realm. For example, this determination could ensure that the
 24 Coast Guard undertakes the appropriate environmental review of its actions under the National
 25 Environmental Policy Act as well as tribal consultation with ocean-going tribes such as the
 26 Tongva Ancestral Territorial Tribal Nation whose vital cultural interests are affected by the
 27 Coast Guard’s regulation of ship traffic in ancestral areas. See, e.g., 42 U.S.C. § 4321 *et seq.*
 28 (National Environmental Policy Act); 16 U.S.C. § 470f (National Historic Preservation Act,
 tribal consultation); E.O. 13175 re Consultation and Coordination With Indian Tribal
 Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000). As the D.C. Circuit noted, “[b]y giving the
 Coast Guard authority to promulgate traffic separation schemes, Congress intended to make the
 Coast Guard accountable for them.” Defenders of Wildlife v. Gutierrez, U.S. App. LEXIS
 15294 at *38.

1 measures off the California coast has effects “extending far beyond their mere approval.” 30
 2 F.3d 1050, 1053 (9th Cir. 1994) (finding Long Range Management Plans for National Forests to
 3 be “ongoing agency action” because they govern every individual project implemented in the
 4 forest); Washington Toxics Coalition v. Env'l. Prot. Agency, 413 F.3d 1024, 1033 (9th Cir.
 5 2005) (section 7 consultation was required for the registration of insecticides under the Federal
 6 Insecticide, Fungicide, and Rodenticide Act, even after registration occurred if no consultation
 7 was done initially, because EPA retained continuing authority to alter or cancel those
 8 registrations). The Coast Guard’s decisions in this regard govern where and how ships travel off
 9 the California coast long after a given traffic measure is adopted and the Coast Guard retains
 10 discretion to alter those measures to accommodate legally authorized aims such as
 11 environmental protection. Because the Coast Guard’s actions regarding shipping traffic have
 12 ongoing effects, they are continuing agency actions to which the consultation requirements of
 13 section 7 apply. The Coast Guard must consult with NMFS regarding the impacts of these
 14 actions on endangered species.

15 B. The Coast Guard Has Statutory Authority to Benefit Endangered Species.

16 The PWSA “confers sufficient discretion” on the Coast Guard “to benefit listed species.”
 17 See Turtle Island Restoration Network, 340 F.3d at 977; see also id. at 974 (“the discretionary
 18 control retained by the federal agency must have the ability to inure to the benefit of a protected
 19 species”) (citing Env'l. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001)).
 20 In Turtle Island, the Ninth Circuit explained that ESA consultation requirements could be
 21 triggered only by agency actions taken pursuant to the authority of a statute that allowed the
 22 agency to protect listed species (otherwise, the consultation would be meaningless since the
 23 agency would not be able to alter its action based on the consultation). Id. at 974-75 (citing
 24 Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995)). Here, the Coast Guard’s regulation
 25 of shipping traffic is undertaken pursuant to the PWSA, which explicitly provides that the Coast
 26 Guard is to protect the marine environment. 33 U.S.C. §§ 1221(a)-(b) (“navigation and vessel
 27 safety, [and] protection of the marine environment . . . are matters of major national
 28 importance;” “increased vessel traffic in the Nation’s ports and waterways creates substantial

1 hazards to life, property and the marine environment."); see also 33 U.S.C. § 1224(a)(6)
 2 (requiring the Coast Guard to consider "environmental factors" in carrying out its duties under
 3 the PWSA). Moreover, the ESA itself contemplates that the Coast Guard will alter its actions
 4 for the protection of listed species. 16 U.S.C. § 1540(f) (authorizing the Coast Guard "to
 5 promulgate such regulations as may be appropriate to enforce" the Act). Thus, the Coast
 6 Guard's actions pursuant to its PWSA authority trigger consultation requirements.

7 **C. The Coast Guard's Actions May – and Do – Affect Endangered Species.**

8 The Coast Guard's implementation of the TSSs off the California Coast and ancillary
 9 activities carried out under the PWSA have resulted in the death of numerous listed whales and
 10 continues to threaten blue whales, humpbacks, and other species present in these waters. "If an
 11 agency determines that its proposed action 'may affect' an endangered or threatened species, the
 12 agency must formally consult with the relevant Service." Natural Resources Defense Council v.
 13 Houston, 146 F.3d at 1125; 50 C.F.R. § 402.14. The threshold question in determining whether
 14 a particular agency action "may affect" a listed species is whether "an endangered or threatened
 15 species may be present in the area of the proposed action." City of Sausalito v. O'Neill, 386
 16 F.3d 1186, 1215 (9th Cir. 2004) (citing 16 U.S.C. § 1536(c)(1) (regarding the biological
 17 assessment that precedes or accompanies consultation)). Here, the ships abiding by the Coast
 18 Guard's regulations in the past have encountered, sometimes fatally, listed endangered and
 19 threatened species, including the blue whale. Further, the blue whale, the sei whale, the
 20 humpback whale, and other listed species migrate up and down the California coast each year
 21 and thus are present in the area affected by the Coast Guard's action. Cummings Decl., Ex. A;
 22 Answer at ¶¶32, 36. The Coast Guard's action thus "may affect" endangered marine mammals
 23 and other species.

24 Formal consultation with NMFS with respect to the Coast Guard's regulation of ship
 25 traffic in shipping lanes off the California coast would insure that the implementation of the
 26 shipping regulations does not interfere with the survival and recovery of protected species. Ship
 27 strikes are always harmful and often fatal to whales. Because the Coast Guard is engaged in
 28 ongoing affirmative agency action within the Santa Barbara Channel and elsewhere along the

1 California coast, it is required to consult with NMFS to determine necessary mitigation to
 2 reduce or eliminate the detrimental impacts of these actions on endangered whales.

3 Notably, NMFS has already spelled out some actions the Coast Guard could take
 4 pursuant to the PWSA and ESA consultation which would protect species. As NMFS has
 5 recognized, setting speed limits is an important step toward reducing whale deaths from vessel
 6 traffic in the Santa Barbara Channel and elsewhere. Treece Decl., Ex. C. Designating parts of
 7 the channel as “hazardous” when whales are sighted in the TSS, advising vessels of the
 8 locations of whales in the channel, or installing monitoring buoys that detect the presence of
 9 whales and alert vessel traffic of their presence are additional measures the Coast Guard is
 10 authorized to implement under its existing PWSA authority that could protect endangered
 11 whales. Thus, the Coast Guard’s actions regulating shipping traffic can and do affect protected
 12 species, and consultation could and would protect them.

D. New Information About Whale Mortalities Requires Consultation.

The information about increased incidence of blue whale mortalities during the fall of
 15 2007 is the type of information which would ordinarily trigger “reinitiation” of consultation had
 16 the Coast Guard ever formally consulted with NMFS regarding its shipping traffic regulations
 17 off the California Coast. 50 C.F.R. § 402.16; Sierra Club v. Marsh, 816 F.2d 1376, 1387-88 (9th
 18 Cir. 1987) (agencies have a continuing duty under section 7(a)(2) to gather and evaluate new
 19 information concerning the environmental impact of its actions); Mt. Graham Red Squirrel v.
 20 Madigan, 954 F.2d 1441, 1445 (9th Cir. 1992) (“The duty to consult is ongoing.”); see Pac.
 21 Coast Fedn. of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation, 2006 U.S. Dist. LEXIS
 22 24893, *16-17 (N.D. Cal. March 27, 2006) (“new information” requiring the agency to reinstitute
 23 consultation included a fish kill of a greater size than anticipated in the original consultation).
 24 The Coast Guard’s failure to consult in the first place, in light of the new information about
 25 potentially changing conditions, heightens the need for a formal consultation now in order to
 26 prevent further injury to blue whales, other protected species, and Plaintiff’s interests.

VI. CONCLUSION

For all the foregoing reasons Plaintiff respectfully requests that the Court grant its Motion for Summary Judgment, and: (1) declare the Coast Guard to be in violation of section 7(a)(2) of the ESA for failing to enter into and complete consultation on the impacts of the TSSs in the Santa Barbara Channel, the approach to Los Angeles-Long Beach, and off San Francisco, and all other Coast Guard measures related to vessel traffic management off the California Coast, on the blue whale and other threatened and endangered species; (2) order the Coast Guard to initiate Section 7 consultation regarding the impacts to threatened and endangered species from Coast Guard regulation of ship traffic off the California coast; and (3) order the Coast Guard to implement such measures as necessary and proper to cease the endangerment of whales from vessel traffic until consultation with NMFS has been completed.

Dated: August 26, 2008

Respectfully submitted,

/s/ Andrea A. Treece
Andrea A. Treece
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, California 94104
Phone: 415-436-9682
Facsimile: 415-436-9683
E-mail: atreece@biologicaldiversity.org